

Message Text

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C O N F I D E N T I A L SECTION 01 OF 06 BONN 00452

E.O. 11652: GDS

TAGS: PFOR PGOV WB GW UR US UK FR

SUBJECT: FRG-SOVIET LEGAL ASSISTANCE (NON-)AGREEMENT

REFS: (A) STATE 4129; (B) USBER 2608; (C) BONN 20427;

(D) USBER 2557; (E) BONN 20119

BEGIN SUMMARY. FOLLOWING TWO RECENT TRIPARTITE DISCUSSIONS OF THE FRG-SOVIET LEGAL ASSISTANCE NEGOTIATIONS, WHICH REFLECTED CONSIDERABLE DIVERGENCE OF OUTLOOK, ALLIED REPS ON JANUARY 7 ASKED FOR AND RECEIVED FRG ASSURANCES THAT THE NEGOTIATIONS WOULD NOT BE CONCLUDED BEFORE FULL CONSULTATION HAD BEEN COMPLETED. IN DISCUSSIONS WITH THE BRITISH AND FRENCH (BEFORE RECEIPT OF GUIDANCE IN REFTEL A), THE US REP HAS URGED THAT THE ALLIES FIRST REACH AGREEMENT ON WHETHER THE FRG-SOVIET PACKAGE IS TO BE TREATED BY THEM AS AN AGREEMENT OR AS A NON-AGREEMENT. FROM THAT DECISION WILL FLOW ALL OTHER DECISIONS ON WHAT ACTION IS NEEDED BY THE ALLIES TO PERMIT AN ARRANGEMENT ON LEGAL

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ASSISTANCE TO BE GIVEN EFFECT IN BERLIN. THE FRENCH REP

AGREES GENERALLY WITH THE EMBASSY'S VIEW THAT IT IS BOTH MORE REALISTIC AND SAFER FOR OUR LONG-RANGE INTERESTS TO REGARD THE PACKAGE AS AN AGREEMENT AND TO MAKE CLEAR THAT THE PARTIES TO IT ARE THE FRG AND THE USSR. THE BRITISH, ON THE OTHER HAND, STRONGLY FAVOR GOING ALONG WITH THE GERMAN THEORY THAT THERE IS NO "AGREEMENT" AND IGNORING THE SOVIET VIEW TO THE CONTRARY. WE, OF COURSE, AGREE WITH THE DEPARTMENT THAT WE SHOULD NOT PUT OURSELVES IN A POSITION OF APPEARING TO BLOCK THE ARRANGEMENT (WHICH IS OF CONSIDERABLE IMPORTANCE TO FOREIGN MINISTER GENSCHER HIMSELF), BUT WE THINK THE FRG HAS SOME TOUGHER THINKING TO DO. ACTION REQUESTED: FURTHER GUIDANCE FROM THE DEPARTMENT, IN THE LIGHT OF THE STATUS OF CONSULTATIONS IN BONN. END SUMMARY.

1. AT THE JANUARY 7 BONN GROUP MEETING (BEFORE RECEIPT OF GUIDANCE IN REF A), THE US REP, AS CHAIRMAN, INFORMED THE FRG REP THAT THE LEGAL ASSISTANCE MATTER WAS BEING CAREFULLY AND ACTIVELY STUDIED IN AN ATTEMPT TO RECONCILE LEGAL THEORIES WITH POLITICAL REALITIES AND TO COME TO A DECISION ON WHAT ACTION, IF ANY, WOULD BE REQUIRED BY THE AK TO GIVE EFFECT IN BERLIN TO THE MEASURES DECIDED UPON BY THE FRG AND THE USSR.

2. NOTING THAT HE WAS SPEAKING WITHOUT INSTRUCTIONS, THE US REP ADDED THAT IT SEEMED CLEAR THAT THE SOVIET INTENTION TO PROVIDE NOTICE TO THE THREE ALLIES WAS VERY TROUBLESOME AND WOULD SEVERELY COMPLICATE MATTERS. PENDING CONCLUSION OF ALLIED STUDY, THE MATTER WAS RAISED NOW SIMPLY TO EXPRESS THE HOPE THAT THE FRG WAS NOT CONTEMPLATING BRINGING THE DISCUSSIONS WITH THE SOVIETS TO A CONCLUSION BEFORE THERE HAD BEEN FURTHER BONN GROUP DISCUSSIONS.

3. THE FRG REP (LUECKING) SAID HE COULD ASSURE THE ALLIES THAT NOTHING WOULD BE DONE WITH THE SOVIETS UNTIL THERE HAD BEEN FULL DISCUSSION WITH THE ALLIES. HE ALSO SAID THAT FONOFF POLITICAL DIRECTOR VAN WELL HAD ALREADY TOLD THE SOVIETS THAT ANY NOTIFICATION TO CONFIDENTIAL

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THE ALLIES WOULD BE "ENTIRELY UNACCEPTABLE." ASKED WHETHER THIS MESSAGE HAD BEEN GIVEN THE SOVIETS SINCE THE BRUSSELS SENIOR LEVEL MEETING, AT WHICH VAN WELL ONLY MENTIONED HAVING TOLD THE SOVIETS THAT WRITTEN NOTIFICATION WAS UNACCEPTABLE, LUECKING SAID VAN WELL WAS IN FAIRLY FREQUENT CONTACT WITH SOVIET EMBASSY OFFICIALS AND ON EACH OCCASION MADE THE POINT ABOUT NOTIFICATION, IN ORDER TO LAY THE GROUNDWORK WITH THE

SOVIETS.

4. THE FRG LEGAL ADVISOR (DUISBERG) ADDED THAT THE FONOFF WAS CURRENTLY DISCUSSING WITH THE MINISTRY OF JUSTICE THE MODALITIES FOR IMPLEMENTING THE NEW PROCEDURES IN ALL OF THE FRG LAENDER. WHEN THESE

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DISCUSSIONS WERE COMPLETED, THE ALLIES WOULD BE INFORMED. THE INFORMATION WOULD BE RELEVANT TO THE US REP'S REFERENCE TO POSSIBLE AK ACTION AND WOULD, DUISBERG ADDED, SHOW WHY IN THE FRG VIEW THERE WOULD BE NO LEGAL NEED FOR ANY SUCH ACTION.

5. BOTH THE BRITISH AND FRENCH REPS ASSOCIATED THEMSELVES WITH THE US REMARKS, WITH THE FRENCH REP (BOISSIEU) ADDING THAT, WHILE THE FRENCH HAD NOT YET COME TO ANY FINAL CONCLUSION ON THE PACKAGE AS A

WHOLE, THEY HAD ALREADY CONCLUDED THAT ANY KIND OF NOTIFICATION FROM THE SOVIETS TO THE ALLIES WOULD BE UNACCEPTABLE.

6. THIS JANUARY 7 BONN GROUP DISCUSSION, INTENDED BY THE ALLIED REPS TO ASSURE THAT THE FRG WAS NOT ON THE VERGE OF COMPLETING THE ARRANGEMENT WITH THE SOVIETS, FOLLOWED TWO LENGTHY AND INCONCLUSIVE TRIPARTITE
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DISCUSSIONS, ON DECEMBER 22 AND JANUARY 6, IN WHICH EFFORTS WERE MADE TO COME TO A COMMON ALLIED APPROACH TO THE PROBLEM. IN BOTH OF THOSE MEETINGS, THE US REP TOOK THE POSITION THAT IT WAS ESSENTIAL FOR THE ALLIES TO AGREE AMONG THEMSELVES AS TO WHETHER WE WERE TREATING THE PROPOSED ARRANGEMENT AS AN AGREEMENT OR A NON-AGREEMENT. FROM THAT DECISION WOULD FLOW ALL OTHER DECISIONS ON WHAT ALLIED ACTION WAS NECESSARY TO PERMIT IMPLEMENTATION OF AN ARRANGEMENT IN BERLIN. THERE IS AS YET NO AGREEMENT AMONG THE THREE ALLIED REPS ON THAT ISSUE.

7. IN TRIPARTITE DISCUSSIONS, THE US REP HAS OUTLINED EMBASSY THINKING AS FOLLOWS:

A. THE FRG INSISTS THE NEW ARRANGEMENT IS NOT AN INTERNATIONAL AGREEMENT BUT SIMPLY A SIMULTANEOUS AND PARALLEL ADJUSTMENT OF INTERNAL PROCEDURES. IN THE FRG VIEW, NO AGREEMENT IS NEEDED, FIRST BECAUSE THE QA SPECIFIES THE RIGHT OF THE FRG TO PERFORM CONSULAR SERVICES FOR PERMANENT RESIDENTS OF THE WSB, AND SECOND BECAUSE THE 1954 HAGUE CONVENTION, WHICH HAS BEEN EXTENDED TO BERLIN, PERMITS LEGAL ASSISTANCE REQUESTS TO BE EXCHANGED DIRECTLY BETWEEN AUTHORITIES OF PARTIES TO THE CONVENTION RATHER THAN VIA CONSULAR OFFICIALS.

B. THE SOVIETS, ON THE OTHER HAND, CONSIDER THAT THEY ARE REACHING AN AGREEMENT, AND BELIEVE ONE IS REQUIRED BOTH BECAUSE THEY DENY THAT LETTERS ROGATORY ARE "CONSULAR SERVICES" WITHIN THE MEANING OF THE QA (SINCE "STATUS" IS INVOLVED) AND BECAUSE OF THEIR POSITION THAT THE HAGUE CONVENTION IS NOT IN FORCE BETWEEN THE USSR AND THE FRG OR THE USSR AND THE WSB. THE QUESTION IS, WITH WHOM ARE THE SOVIETS CONCLUDING AN AGREEMENT? THEIR INSISTENCE ON A UNILATERAL DECLARATION, THE CONTEXT IN WHICH THEY PROPOSE TO CITE THE QA IN THAT DECLARATION, AND THEIR PLAN FOR NOTIFYING THE THREE WESTERN ALLIES ALL RAISE STRONG SUSPICIONS THAT THEY INTEND TO PORTRAY IT AS AN AGREEMENT WITH THE THREE ALLIES. THIS WOULD BE CONSISTENT WITH THEIR

ARGUMENT THAT LEGAL ASSISTANCE AFFECTS MATTERS OF
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STATUS, ON WHICH THE THREE ALLIES ARE THE ONLY ONES
COMPETENT TO REPRESENT THE WSJ INTERNATIONALLY.
ALTERNATIVELY, OR PERHAPS SIMULTANEOUSLY, THE SOVIETS
MIGHT POINT TO THE AGREEMENT AS ONE BETWEEN THE USSR
AND THE SENAT, AN EXAMPLE OF THE STRENGTHENING OF
DIRECT TIES AS PROMISED IN THE OCTOBER 1975 SOVIET-GDR
TREATY. THERE WOULD THUS BE A PRECEDENT FOR THE
FOLLOW-ON AGREEMENTS ON LEGAL ASSISTANCE WHICH THE FRG
HOPES TO CONCLUDE WITH EAST EUROPEAN COUNTRIES.

C. IT WOULD BE DIFFICULT FOR THE ALLIES TO ACCEPT
EITHER THE FRG THEORY OR THE SOVIET THEORY.
ACQUIESCENCE IN THE FRG "NON-AGREEMENT" POSITION WOULD
LEAVE UNCHALLENGED THE SOVIET POSITION AND SET TROUBLE-
SOME PRECEDENTS FOR THE FUTURE. MOREOVER, IT IS HARD
TO AGREE, AND HARDER TO PORTRAY PUBLICLY, THAT THE NEW
PROCEDURES ADOPTED AFTER MORE THAN TWO YEARS OF
DIFFICULT NEGOTIATIONS ARE NOT, AS A MINIMUM, AN
INTERNATIONAL "ARRANGEMENT" OR "UNDERTAKING," AS THOSE
TERMS ARE USED IN ALLIED LEGISLATION AND THE QA.

D. IN THE EMBASSY VIEW, THEREFORE, THE LESS
DANGEROUS COURSE IS TO TREAT THE PACKAGE AS AN AGREE-
MENT AND TO MAKE CLEAR THAT IT IS ONE CONCLUDED BETWEEN
THE FRG AND THE USSR.

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E. TO ACHIEVE THIS, IT WILL BE NECESSARY TO FOLLOW THE "ESTABLISHED PROCEDURES" AS SET OUT IN BCK/L(52)6 AND BK/L(64)1 -- I.E., TO HAVE THE AGREEMENT SUBMITTED TO THE ALLIES FOR THEIR APPROVAL OF ITS EXTENSION TO BERLIN.

F. THE ORAL DECLARATIONS AS PRESENTLY DRAFTED ARE LESS THAN IDEAL FOR THIS PURPOSE, GIVEN THE LACK OF A DIRECT LINKAGE BETWEEN THE TWO DECLARATIONS TO BE MADE BY THE SOVIET AMBASSADOR. THERE IS, HOWEVER, NO SPECIFIED FORM FOR EXPRESSING THE INTENTION THAT AN AGREEMENT IS TO BE EXTENDED TO BERLIN, AND WE BELIEVE THAT THE AK -- EVEN IF THE FRG IS UNABLE TO OBTAIN ANY IMPROVEMENTS IN THE DECLARATIONS -- COULD LOOK AT THE PACKAGE AS A WHOLE AND DISCOVER SUCH AN INTENT. THE TWO PARALLEL DECLARATIONS (PARA 5.A, REF E) STATE THAT LEGAL ASSISTANCE COMMUNICATIONS WILL BE EX-CONFIDENTIAL

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CHANGED DIRECTLY BETWEEN OFFICIALS OF THE UNION REPUBLICS OF THE USSR AND OFFICIALS OF "THE FEDERAL LAENDER OF THE FRG." IN FRG CONSTITUTIONAL THEORY, THIS LATTER FORMULATION INCLUDES BERLIN; FOR THE SOVIETS, OF COURSE, IT DOES NOT. BUT THE IMMEDIATELY FOLLOWING UNILATERAL SOVIET DECLARATION (PARA 5.B, REF E) CONCERNING BERLIN -- STILL PART OF THE PACKAGE -- WOULD CORRECT THAT OMISSION. THE FINAL UNCHALLENGED FRG DECLARATION (PARA 5.C, REF E) CLEARLY RELATES BOTH TO THE LAENDER AND TO BERLIN.

G. IF THE ACTION COULD BE TIMED SO THAT AN ALLIED BK/O APPROVING THE EXTENSION OF THE AGREEMENT TO BERLIN WERE ISSUED ALMOST SIMULTANEOUSLY WITH THE

EXCHANGE OF DECLARATIONS IN BONN, WE COULD THEN TURN
ASIDE ANY NOTIFICATION FROM THE SOVIETS AS IRRELEVANT.

8. WHILE URGING THE FOREGOING AS THE PREFERABLE
SCENARIO, THE US REP HAS ADMITTED IN TRIPARTITE
DISCUSSIONS THAT IT MAY NOT WASH WITH THE FRG OR WITH
THE SOVIETS. WE HAVE THUS ELABORATED AS A FALLBACK
POSITION OUR EARLIER IDEA (PARA 10, REF C) OF
ACQUIESCENCE IN THE FRG "NON-AGREEMENT" THEORY BUT
TAKING AK ACTION SOLELY AS AN ATTEMPT TO MAKE CLEAR
FOR THE RECORD WHY THIS IS SO. WHAT MIGHT BE USED FOR
THIS PURPOSE WOULD BE A BK/O WHICH WOULD APPEAR TO BE
AIMED AT APPROVING SENAT REGULATIONS AUTHORIZING DIRECT
DEALINGS WITH SOVIET AUTHORITIES AT REPUBLIC LEVEL,
BUT WHICH WOULD MAKE THE ADDITIONAL POINTS THAT (A) IT
WAS THE FRG WHICH WORKED OUT WITH THE USSR THE NEW
PROCEDURES ON BERLIN'S BEHALF, AND (B) THAT WE AGREE
WITH THE FRG THAT THE HAGUE CONVENTION APPLIES TO
BERLIN AND THAT THE NEW PROCEDURES ARE SIMPLY AN
IMPLEMENTATION OF THE FOURTH SUBPARAGRAPH OF
ARTICLE IX OF THAT CONVENTION. WE HAVE OFFERED FOR
BRITISH AND FRENCH CONSIDERATION THE FOLLOWING
DRAFT BK/O:

BEGIN TEXT

SUBJECT: SENATOR FOR JUSTICE REGULATION ON HANDLING
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LEGAL ASSISTANCE REQUESTS WITH THE USSR

1. THE AK HAS TAKEN NOTE OF THE EXCHANGE OF VIEWS
WHICH HAS TAKEN PLACE BETWEEN AUTHORITIES OF THE FEDERAL
REPUBLIC OF GERMANY AND OF THE USSR ON THE HANDLING OF
REQUESTS FOR LEGAL ASSISTANCE.

2. THE AK AUTHORIZES IN PRINCIPLE THE INSTITUTION IN
BERLIN OF THE PROCEDURES ENVISAGED IN THOSE DISCUSSIONS
FOR HANDLING LEGAL ASSISTANCE MATTERS, WHICH ARE
REFLECTED IN SENATOR FOR JUSTICE REGULATION (BLANK)
AND WHICH ARE CONSISTENT WITH ARTICLE 9 OF THE HAGUE
CONVENTION.

3. THIS ORDER WILL BE TRANSMITTED TO THE GOVERNING
MAYOR OF BERLIN FOR SUCH ACTION AS MAY BE NECESSARY,
INCLUDING PUBLICATION IN ACCORDANCE WITH BK/O(64)4.
END TEXT.

9. IN TRIPARTITE DISCUSSIONS THE FRENCH REP (BOISSIEU)
EXPRESSED GENERAL AGREEMENT WITH THE US VIEW THAT WHAT

IS BEING CONCLUDED IS AN INTERNATIONAL AGREEMENT OR
ARRANGEMENT. HE NOTED THAT, EVEN THOUGH WE MIGHT PRO-
DUCE A BONN GROUP PAPER SAYING IT WAS A NON-AGREEMENT,
WE WOULD BE IN A RIDICULOUS POSITION POLITICALLY; TO THE

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REST OF THE WORLD IT WAS CLEARLY AN AGREEMENT. ,
MOREOVER, THE FRG TENDENCY TO CONCLUDE "NON-AGREEMENTS"
WITH THE EASTERN COUNTRIES ON THE BASIS OF UNILATERAL
STATEMENTS FROM THE LATTER WAS A DANGEROUS ONE FOR THE
LONG RUN.

10. WHILE HE HAD NO EASY SOLUTION IN MIND, BOISSIEU
THOUGHT WE SHOULD INSIST TO THE FRG THAT THERE MUST BE
NO NOTIFICATION FROM THE SOVIETS TO THE ALLIES AND THAT
THERE SHOULD EITHER BE A MODIFICATION OF THE FALIN
UNILATERAL DECLARATION, TO LINK IT DIRECTLY TO THE
MUTUAL SOVIET-FRG DECLARATIONS, OR A LETTER FROM THE

FRG TO THE ALLIES SAYING THAT THERE WAS AN AGREEMENT WHICH BOTH SIDES INTENDED BE APPLIED TO BERLIN.

11. THE UK REP, ON THE OTHER HAND, INSISTS FIRMLY THAT WE SHOULD GO ALONG WITH THE FRG "NON-AGREEMENT" THEORY. THE UK EMBASSY HAS RECOMMENDED TO LONDON (AND EXPECTS CONFIDENTIAL

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INSTRUCTIONS MOMENTARILY SUPPORTING THAT RECOMMENDATION) THAT WE SHOULD TELL THE FRG (A) THAT WE AGREE IT IS NOT AN AGREEMENT BUT SIMPLY A RECIPROCAL ADJUSTMENT OF INTERNAL LAWS (FOR WHICH MANY EXAMPLES EXIST IN COMMONWEALTH PRACTICE), (B) THAT WE THEREFORE HAVE NO INTEREST IN BEING INFORMED ABOUT EXCHANGES OF DECLARATIONS WITH THE SOVIETS, AND (C) THAT WHEN THE SENAT ADOPTS REGULATIONS FOR IMPLEMENTING THE NEW PROCEDURES THE AK CAN APPROVE THEM IN SILENCE. WHAT THE UK REP WOULD INSIST ON IS THAT THE FRG INFORM THE SOVIETS THAT IF THEY WERE TO MAKE A UNILATERAL DECLARATION TO THE ALLIES THE LATTER WOULD PROBABLY REACT IN A WAY THAT WOULD TORPEDO THE WHOLE ARRANGEMENT. THE BRITISH VIEW IS THAT WE CAN GO ALONG WITH THE NON-AGREEMENT SCENARIO ONLY IF THE SOVIETS DO NOTHING THAT WOULD SEEM TO DISPUTE IT; THE UK REP SEEMS CONFIDENT THAT THE FRG CAN DISSUADE THE SOVIETS FROM NOTIFYING THE ALLIES, IF WE MAKE CLEAR IN ADVANCE THAT THE RESULTS WOULD BE DISASTROUS FOR THE DEAL.

12. THE UK REPS ALSO POINT TO FLAWS IN OUR RATIONALE (PARA 7.F, ABOVE) FOR TREATING THE PACKAGE AS AN AGREEMENT. THE UK LEGAL ADVISER (EDWARDS) IS EXTREMELY DUBIOUS THAT THE FRG WOULD BE ABLE TO CERTIFY TO THE AK, AS REQUIRED BY BK/L(64)1, THAT BOTH PARTIES INTEND THAT THERE IS AN AGREEMENT AND THAT IT IS TO BE EXTENDED TO BERLIN, BECAUSE OF THE KNOWN SOVIET DISAGREEMENT ON THAT POINT. WE HAVE ARGUED THAT WE DO NOT THINK IT IS AN INSUPERABLE PROBLEM. IF THE FRG IS RIGHT IN THINKING THAT THE SOVIETS ARE INTERESTED IN A PRACTICAL ARRANGEMENT WHICH WILL LEAVE THE LEGAL POSITION OF BOTH SIDES INTACT, IT MIGHT ALSO CLOSE ITS EYES TO A PROCEDURAL MANEUVER AIMED AT PROTECTING THE ALLIED LEGAL POSITION AS WELL. IF, ON THE OTHER HAND, THE SOVIETS BALK ON THAT POINT IT MIGHT BE INSTRUCTIVE FOR THE FRG TO FIND IT OUT IN ADVANCE. (WE ASSUME THE FRG WOULD TELL THE SOVIETS WHAT THE ALLIES INTENDED TO DO.)

13. COMMENT: WE HAVE, OF COURSE, APPROACHED THE ENTIRE PROBLEM FROM THE POINT OF VIEW THAT, AS CONFIDENTIAL

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INSTRUCTED IN REF (A), WE SHOULD NOT BE SEEN BY THE GERMANS AS ATTEMPTING TO BLOCK THE ARRANGEMENT. WE RECOGNIZE THAT IT IS ONE ON WHICH THE FRG HAS EXPENDED CONSIDERABLE POLITICAL CAPITAL, AND ANY EFFORT TO UNDERMINE IT WOULD CAUSE SERIOUS FRICTION WITH THE FRG. WHILE THE CHANCELLOR HIMSELF IS NOT SO ENGAGED AS WAS THE CASE WITH THE RECENTLY COMPLETED FRG-GDR TRANSIT NEGOTIATIONS, FONMIN GENSCHER IS PERSONALLY INVOLVED AND DOUBTLESS WANTS A SUCCESSFUL OUTCOME, PARTICULARLY IN AN ELECTION YEAR. IT WAS GENSCHER'S PREDECESSOR AS FONMIN AND FDP CHAIRMAN WHO ACHIEVED THE FIRST BREAKTHROUGH WITH GROMYKO ON A POSSIBLE SOLUTION TO THE LEGAL ASSISTANCE PROBLEM, AND THE PROPOSED BILATERAL DECLARATIONS (PARA 5.A, REF E) SPECIFICALLY REFER TO THE 1973 SCHEEL-GROMYKO "AGREEMENT" AS THE BASIS FOR THE SUBSEQUENT "EXCHANGE OF VIEWS" AND THE PRESENT SCENARIO.

14. AT THE SAME TIME, WE THINK IT ADVISABLE TO POINT OUT TO THE FRG ON A SUITABLE OCCASION THE INCONSISTENCY BETWEEN THE PROPOSED PROCEDURES, WHICH WOULD UNDERCUT THE FRG RIGHT OF REPRESENTATION OF THE WSB ABROAD, WITH GERMAN INSISTENCE THAT NATO MINISTERS, IN THE

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DECEMBER 12 COMMUNIQUE, STRESS THE IMPORTANCE TO THE
VIABILITY OF BERLIN OF FRG REPRESENTATION OF THOSE
INTERESTS (REF B).

15. GIVEN THE STATE OF CONSULTATIONS AS
SUMMARIZED ABOVE, WE OFFER THE FOLLOWING COMMENTS ON
THE SEVERAL SUGGESTIONS MADE BY THE DEPARTMENT IN ITS
GUIDANCE TELEGRAM (PARA 2, REF A):

A. MODIFICATION OF SOVIET UNILATERAL DECLARATION,
TO ESTABLISH DIRECT LINKAGE BETWEEN THE AGREEMENT
CONCERNING THE FRG LAENDER AND THAT AFFECTING BERLIN:
WE AGREE WITH USBER AND THE DEPARTMENT THAT THIS WOULD
BE THE OPTIMUM SOLUTION. SINCE SOVIET REFUSAL TO
RECOGNIZE THE COMPETENCE OF THE FRG TO MAKE SUCH AN
AGREEMENT ON BEHALF OF BERLIN IS, HOWEVER, WHAT THE
ENTIRE ARGUMENT HAS BEEN ABOUT, WE DOUBT THAT SUCH A
MODIFICATION IS OBTAINABLE. WE WILL, OF COURSE, PUT
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IT TO THE FRG AS THE BEST SOLUTION. THE FRENCH
WILL PROBABLY SUPPORT US IN SUCH AN EFFORT
BUT BRITISH SUPPORT SEEMS MORE DOUBTFUL, GIVEN THE
APPARENT BRITISH ATTITUDE OF DOING NOTHING TO DISAGREE
WITH WHAT THE GERMANS ARE WILLING TO ACCEPT. (WE
HAVE THE DISTINCT IMPRESSION THAT THIS BRITISH ATTITUDE
IS A REFLECTION OF A LAY-LOW POSTURE IN THE AFTERMATH
OF THE EXHAUSTION OF BRITISH CAPITAL WITH THE GERMANS
AT THE ROME SUMMIT.)

B. REPLACEMENT OF THE FRG-USSR BILATERAL
DECLARATION WITH A UNILATERAL USSR ONE: ASSUMING THE
FRG REFUSES TO TRY FOR FURTHER MODIFICATIONS OF THE
AGREED WORDING, OR TRIES AND FAILS, WE WILL THEN GO ON
TO NEXT STEPS. THIS PARTICULAR NEXT STEP AS SUGGESTED
BY THE DEPARTMENT IS, HOWEVER, UNCLEAR TO US, AND WE
WOULD APPRECIATE CLARIFICATION. THE DEPARTMENT SEEMS

TO BE SUGGESTING ONLY A REORDERING OF THE SEQUENCE OF THE CONTEMPLATED THREE DECLARATIONS, SO THAT THE FRG DECLARATION FOLLOWS THE TWO SOVIET ONES. WE DO NOT UNDERSTAND HOW THIS WOULD AFFECT THE SUBSTANCE OF THE MATTER. IF WE CHOOSE TO GO THE NON-AGREEMENT ROUTE, AS THE DEPARTMENT IS SUGGESTING HERE AS A FIRST FALLBACK, WE COULD AS EASILY CLOSE OUR EYES TO THE SEQUENCE IN WHICH THE DECLARATIONS ARE MADE AS TO THE FACT THAT COLLECTIVELY THEY CONSTITUTE A PACKAGE WHICH SMACKS STRONGLY OF AN AGREEMENT. WE BELIEVE IT WOULD BE PREFERABLE FIRST TO TRY OUT THE "AGREEMENT" THEORY ON THE FRG USING THE RATIONALE IN PARA 7.F, ABOVE.

C. NOTIFICATION TO ALLIES: WE ARE RELUCTANT TO ACQUIESCE IN THIS. WE ASSUME THE SOVIETS PLAN TO NOTIFY US ONLY OF THEIR UNILATERAL DECLARATION CONCERNING BERLIN, NOT OF THE ENTIRE PACKAGE. AS INDICATED ABOVE, WE BELIEVE FAILURE TO REJECT SUCH NOTIFICATION WOULD LEND CREDENCE TO THE THEORY THAT THE SOVIETS ARE CONCLUDING AN AGREEMENT WITH THE THREE POWERS, OR AT A MINIMUM WOULD BE ENCOURAGING THE SOVIET CLAIM TO A FOURTH VOICE IN MATTERS AFFECTING BERLIN. WE ARE INCLINED TO AGREE WITH THE BRITISH AND FRENCH ON THIS POINT, BOTH OF WHOM ARE FIRM ON THE UNACCEPT-
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ABILITY OF NOTIFICATION. AS PREVIOUSLY REPORTED (BONN 19325, PARA 11), THE FRENCH ATTITUDE REPORTEDLY REPRESENTS THE OPINION OF FOREIGN MINISTER SAUVAGNARGUES. ALTHOUGH THE BRITISH HERE EARLIER THOUGHT ANY SOVIET NOTIFICATION COULD SIMPLY BE IGNORED, THEY BELIEVE NOW SUCH NOTICE WOULD DESTROY THEIR THEORY THAT THERE IS NO AGREEMENT AND THAT THE ALLIES SHOULD NOT BE TOLD ANYTHING ABOUT IT BY EITHER SIDE. WE THUS RECOMMEND THAT THE DEPARTMENT RECONSIDER ON THIS POINT AND AUTHORIZE US TO PARTICIPATE IN A TRIPARTITE STATEMENT IN THE BONN GROUP THAT ANY SOVIET NOTIFICATION WOULD BE UNACCEPTABLE, THUS PROVIDING CONFIRMATION FOR THE VIEW THE FRG TELLS US IT HAS ALREADY BEEN EXPRESSING TO THE SOVIETS.

D. WORDING OF UNILATERAL SOVIET DECLARATION CONCERNING BERLIN: THE DEPARTMENT'S POINT IS WELL TAKEN, AND OUR USE OF THE WORD "AGREES" WAS AN IMPRECISE TRANSLATION. ALTHOUGH THERE IS NO AGREED RUSSIAN TEXT AS YET, IN THE GERMANY VERSION THE DECLARATION WOULD READ, "THE SOVIET SIDE DECLARES ITS AGREEMENT/UNDERSTANDING THAT..." ("ERKLAERT IHR EINVERSTAENDNIS DAMIT..."). WE WILL ASK WHETHER THE FRG MIGHT NOT PERSUADE THE SOVIETS TO STATE SIMPLY,

"DECLARES."

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ACTION EUR-12

INFO OCT-01 ISO-00 EURE-00 CIAE-00 DODE-00 PM-04 H-02

INR-07 L-03 NSAE-00 NSC-05 PA-01 PRS-01 SP-02 SS-15

USIA-06 SAJ-01 IO-11 ACDA-05 /076 W

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FM AMEMBASSY BONN

TO SECSTATE WASHDC PRIORITY 5568

INFO USMISSION USBERLIN PRIORITY

USMISSION NATO BRUSSELS

AMEMBASSY BERLIN

AMEMBASSY LONDON

AMEMBASSY MOSCOW

AMEMBASSY PARIS

C O N F I D E N T I A L SECTION 06 OF 06 BONN 00452

E. ELIMINATING ALL FORMAL DECLARATIONS AND ANNOUNCEMENTS: THIS WOULD BE CONGENIAL TO THE BRITISH VIEW AND MIGHT BE WORTH A TRY. WE SEE CERTAIN DANGERS IN IT, HOWEVER, AS THE PUBLIC IS AWARE THAT NEGOTIATIONS ON A "LEGAL ASSISTANCE AGREEMENT" HAVE BEEN GOING ON FOR A LONG TIME. FOR THE POLITICAL REASONS NOTED ABOVE, THE FRG WILL FEEL COMPELLED TO ANNOUNCE THAT THE NEGOTIATIONS HAVE BEEN CONCLUDED AND A BREAKTHROUGH IN FRG-SOVIET RELATIONS ACHIEVED. THE PRESS WILL UNDOUBTEDLY SHORTHAND THIS TO MEAN THAT A LEGAL ASSISTANCE AGREEMENT HAS BEEN CONCLUDED, AND IT WOULD SEEM LESS DAMAGING IN THE LONG RUN TO HAVE A TEXT TO POINT TO. IN ADDITION, THERE MAY BE A PRACTICAL NECESSITY FOR PUBLISHING THE TEXTS AS IS CURRENTLY

PLANNED (PARA 2.E, REF E), IF FOR NO OTHER REASON THAN
TO ESTABLISH THE DATE ON WHICH THE NEW PROCEDURES TO BE
IMPLEMENTED BY EACH OF THE LAENDER ARE TO COME INTO
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FORCE. IF THE DEPARTMENT AGREES, THEREFORE, WE WOULD
PREFER NOT TO TABLE THIS OPTION UNTIL OTHERS HAVE BEEN
TRIED.

16. ACTION REQUESTED: WE WOULD APPRECIATE FURTHER
GUIDANCE FROM THE DEPARTMENT IN LIGHT OF THE ABOVE
REPORT ON THE STATUS OF RECENT CONSULTATIONS,
BEFORE WE RESUME THE NEXT ROUND.
HILLENBRAND

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NNN

Message Attributes

Automatic Decaptioning: X
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Draft Date: 09 JAN 1976
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Disposition Approved on Date:
Disposition Authority: ShawDG
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